1 Introduction

Multireligious, multiethnic, and culturally plural postcolonial societies debate over who should govern the family as states and religious groups struggle to regulate the family. There are several reasons why states and groups aim to regulate the conjugal family: States realize their liberal, secular projects by infiltrating and fashioning individual subjectivities. States also strive for social cohesion, the transmission of property (Glendon 1981, 1989), and the delegation of welfare responsibilities (Menski 2001). In addition, the regulation of family is often tied to the nation-building projects of states (Heuer 2005; Loos 2006; Woods 2004). Furthermore, the demarcation of kinship boundaries forms the basis of the state; it creates race, caste, and religious groups (Cott 2000; Loos 2006), and enables the state to perpetuate itself (Hanley 1989; Stevens 1999). Similarly, religious and cultural groups identify religious or customary laws as markers of group identity and seek autonomy to govern the family. Groups, too, seek to perpetuate themselves and attempt to impact upon or subvert the statist vision of the nation by regulating the family (Woods 2004; Yuval-Davis 1997).

In this context, the key question is whether states should adopt legal centralism[1] and enact uniform laws to govern the family, or provide

[1] Legal centralism is the idea that all law emanates from the state and is adjudicated and enforced by state institutions. Societal normative orders cannot generate "law" as it is distinguished by its efficacy "as a form of social control, institutional enforcement, precision, unity, self-consistency, and doctrinal elaboration" (Hart 1961; Tamanaha 1993; Woodman 1999, 12).

autonomy to religious or cultural groups through the adoption of legal pluralism.[2] States like Turkey, Thailand, and Ethiopia, which have not been officially colonized, have enacted uniform civil codes, though neither has been successful in wiping out legal pluralism on the ground.[3] Among postcolonial states, Tunisia has moved toward some form of centralized legal system and codified Islamic laws, but it has not transplanted or opted for a uniform civil code modeled along the lines of French, German, or Swiss civil codes. Similarly, Tanzania and Morocco have codified their various laws, and Morocco has abolished the autonomy of Berbers in the governance of the family.[4] Most other postcolonial states have opted to provide greater autonomy to ethno-religious groups in governance of the family.

For, the ongoing processes of state formation require that postcolonial states balance economic development, social cohesion, and political stability, as well as create national consciousness, by outlining shared meanings among their citizens through legislation, adjudication, and the enforcement of laws.[5] To serve these ends, the states seek to modernize

[2] The idea and the practice of legal pluralism (i.e., the coexistence of multiple systems of law) exist at many levels in time, space, and knowledge, and many competing versions of legal pluralism remain under discussion. Some scholars characterize the intermingling of suprastate law and official state laws, seen in the case of the European Union, as an example of legal pluralism. Others take different forms of official laws – administrative law (Arthurs 1985) and military law – at the level of the state to exemplify legal pluralism. Thus, the coexistence of different types of law within the realm of the state or between suprastate bodies and nation-states is seen as a typology of legal pluralism.

[3] The Turkish uniform code, though, has not succeeded completely in wiping out religious practices (Starr 1990; Yilmaz 2005). Ethiopia has also tried legal unification through codification, but the civil code was scrapped after the Socialist Revolution in 1974. There was widespread dissatisfaction with the civil code even before that because it enacted entirely new laws that were unfamiliar to the judges; problems of high illiteracy coupled with the survival of other laws made the exercise of codification a failure on the ground (Allott 1970; Hooker 1975; Menski 2006).

[4] These measures are all largely seen as a reaction against the colonial policies of legal pluralism (Menski 2006; Moors 2003).

[5] State formation in Western Europe was a gradual process involving the homogenization of population, secularization, territorial demarcation, the centralization of taxation, legal uniformity, and the monopolization of force (Tilly 1975, 1985). However,

key institutions such as the family and marriage, and shape ethnic, religious, sexual, and gender identities through law. However, postcolonial states are confronted with diverse societal groups that also seek to retain control over the governance of family laws,[6] which are seen as markers of community identities. As a result, most postcolonial societies evince ongoing negotiations between states and societal groups over the content of laws and the extent of community autonomy in the governance of the family.

The assertion of religious family laws as symbols of community identity by societal groups has many implications for women's rights within the family. Women are implicated in the conception of community, as women's productive, reproductive, and cultural labor is used to maintain and perpetuate religio-cultural communities. Their dress, behavior, appearance, and sexuality are controlled to define, separate, limit, and control group boundaries (Sapiro 1993; Shachar 2001; Yuval-Davis 1997). Also, these laws regulate the distribution of resources within the family and define women's rights to own, access, and control these resources (Mukhopadhyay 1998; Shachar 2001). Concerns about women's rights in the family are pivotal to the debates on the regulation of family laws.

state formation is a nonlinear process, and the recent trend has been toward decentralization and differentiation of the state (Warren 2003). The processes of state formation in postcolonial states have been diverse. In some cases, the "overdeveloped postcolonial state" (Alavi 1972) has followed policies of "authoritarian high modernism" to centralize authority, overcome local orders, and penetrate society (Scott 1998). However, a number of scholars have argued that postcolonial state formation was marked, not by zero-sum conflict between the state and other social groups, but by the incorporation and accommodation of local orders into the state (Barkey 1994; Corrigan and Sayer 1985; Hansen and Stepputat 2001; Nugent 1994; Shastri and Wilson 2001).

[6] Religious family laws are also called "personal laws" in India and I use these terms interchangeably. The term "personal laws" came into existence in colonial times as these were laws a person carried within across regions. Personal laws include laws governing group membership (determining who is a group member and defining the exit option in law through a change in group membership through conversion, marriage, voluntary subjection or negation). They also regulate intergroup interactions. Different states have evolved law regarding which areas (family laws or criminal laws) would be governed by group norms in which jurisdictions (geographical boundaries) (Hooker 1975).

The state-society contestations over the governance of the family have an impact on relationships between states and religio-cultural groups, as well as those within religio-cultural groups. For instance, the nonrecognition of Islamic religious laws has led to agitations for the recognition of Islamic laws in South Africa (Amien 2006; Moosa 2002). In India, the state's decision not to codify Muslim religious family law has been contested across religious boundaries by Hindu nationalists and secular modernists alike. In Malaysia, debates over the jurisdictional expansion of Islamic courts spearheaded by the UMNO (United Malays National Organization) government in the 1980s, and over the introduction of the *Hudud* (Islamic Criminal Codes) Bill by the right-wing PAS (Parti Islam Se-Malaysia) government in Kelantan in 1993, have been opposed by non-Malay parties representing the interests of other religious groups (Hamayotsu 2003; Ibrahim 2000; Kamali 2000; Peletz 2002). Indonesia has witnessed conflicts over expanding the scope of Sharia in different provinces (Bowen 2003; Butt 1999; Lev 1972; Lindsey 1999). The expansion of the Sharia in the northern part of Nigeria is one of the reasons for violence between Christians and Muslims in Nigeria and in Sudan. The question of reforming the Personal Law of Egyptian Copts has been a bone of contention between the church, the state, modernist proreform Muslims and Copts, and the antireform lobby comprising conservative Muslims and Copts (Afifi 1996).

State failure to recognize group claims can lead to conflicts, but states that adopt multicultural policies and recognize religious or customary laws are not necessarily exempt from these contestations, as public recognition is often unevenly circumscribed across religious, caste, and indigenous groups. The recognition of religious family laws also shapes and freezes religious and ethnic identities,[7] and these can also contribute to

[7] The argument that state-initiated policies of classification, categorization, and enumeration of the populace freeze group identities is made by numerous scholars (Corrigan and Sawyer 1985; Scott 1998). In the Indian context, the colonial state's legal policies and the postcolonial state's continuation of the system of religious family laws have eroded heterogeneous religious identities and marked boundaries between religious communities (Cohn 1996; Dirks 1992, 2001; Mukhopadhyay 1998; Pandey 1990).

intergroup rivalries. As a result, multireligious and multiethnic democracies face the challenge of constructing policies that can facilitate equality *between and among* diverse ethno-religious groups while ensuring gender equality *within* these groups in the matter of religious family laws.

Who Shall Govern the Family? Outlining Two Approaches

Two strands of theoretical debates inform the issue outlined previously. The first strand, which is society-centered, suggests group autonomy for cultural groups, especially minorities, in the regulation of the family. Chatterjee has argued for "strategic politics of difference" outside the domain of the state. He argues that cultural communities can refuse to be homogenized in the name of dominant reasonableness by developing an "inner democratic forum." The proceedings of this forum should follow codes of transparency, publicity, and representation (Chatterjee 1994). Discussing the nature of ethnic conflict in Sri Lanka, Scott has argued for the cultivation and institutionalization of cultural political spaces in which groups can "formulate their moral-political concerns … in the language of their respective traditions" (Scott 1999, 185). He has called for the creation of modalities through which communities can engage in intracultural dialog of mutual recognition and negotiate claims and counterclaims about the meaning of their traditions (Scott 1999). Although Scott's approach does not prevent reification of group boundaries and does not place gender equality at its center, it does reclaim the centrality of society-centered politics in his project.

In contrast, some proponents of state-centric arguments suggest that difference should be relegated to the private, societal sphere. For instance, Rawls has argued for an "overlapping consensus" in which a diversity of conflicting comprehensive doctrines would endorse the same political conception: justice as fairness in the public domain of culturally diverse, plural societies (Rawls 1996).[8] Thus, the Rawlsian project locates cultural

[8] Rawls's political liberalism has also been criticized for being grounded in universal reason. It has been argued that Rawls has failed to resolve the question of incommensurability of values in societies. Critics argue that Rawls's conception of political

difference in the private realm. Furthermore, cultural difference is almost seen as inessential – a matter of voluntary association. Following Rawls, many feminists and reformers suggest that the state should be the only locus of law in matters related to personal laws. For instance, feminists argue that cultural plurality can be privatized, pursued in forums other than the family law; thus, the demands for religious family law are illegitimate (Parashar and Dhanda 2008).

With regard to debates on the recognition and reforms of religious family laws, scholars argue that religious family laws cement group boundaries and do not reflect religious principles enshrined in classical laws (Phillips 2007). They also point out that the possibility of internal reform in religious laws is limited, as they are not compatible with equality guaranteed in national constitutions or universal rights enshrined in international human rights conventions. Feminists also resist the idea of cultural autonomy in family matters, as groups are imbued with patriarchal values and norms and violate the individual rights of women. Feminists have thus criticized states' adoption of cultural pluralism as states' privileging of group rights over women's rights in the family (An-Na'im 2002a; Cook 1994; Dhagamwar 1974, 1992; Jayal 2001; Joseph 1997; Kukathas 1992; Mahajan 2005; Moghadam 1994; Nussbaum 1995, 2000; Okin 1997, 2005; Parashar, 1992; Phillips 2003, 2004; Sangari 1995, 2003; Welchman 2004). Other state-centric proponents of cultural autonomy argue for special group rights for cultural communities, especially minorities. Young argues that liberalism creates a public sphere that is falsely universal, homogeneous, and abstract. This public realm excludes the voices, experiences, and perspectives of these groups from the formal public realm. She advocates special rights for disadvantaged groups and minorities (Young, 1989, 1990). Similarly, Kymlicka makes a case for three sets of group rights for minorities. These include special representation

liberalism exaggerates the degree of "overlapping consensus" in any society, that it poses rationalistic and legalistic solutions to deal with value pluralism, and that it creates an excessively formal public sphere that is emptied of political indeterminacy and contingencies (Gray 1995).

rights, self-governing rights, and polyethnic rights. He suggests differentiation between two kinds of rights: one that involves the claim of a group against its own members, and one that involves the group's claim against the larger society. He argues that liberalism can only accommodate the ideas of "freedom within groups" and "equality between groups" (Kymlicka 1995, 152). Spinner-Halev also supports group rights, but he argues against state intervention as it violates the group's right to shape its collective identity (Spinner-Halev 1994). These arguments have been criticized because these arrangements have led to the ossification of group boundaries, and they ignore intragroup hierarchies (Deveaux 2006; Kukathas 1992; Okin 1989; Phillips 1995, 2007). Scholars also suggest that the state should provide conditions in which reforms of religious family laws can be initiated (Bilgrami 1994; Deveaux 2000, 2006; Hallaq 2001, 2004, 2005). However, both state-centered and society-centered approaches maintain the critical tension between group autonomy and gender equality, and do not discuss how awarding group rights can prevent the ossification of community boundaries.

In the context of the regulation of family laws, feminists have sought to incorporate intragroup equality while assuring the accommodation of cultural groups by advocating a model to regulate the family. Shachar advocates the "joint governance" approach wherein the state and cultural groups split juridical authority in the regulation of family laws (Shachar 1998, 2001). The institutional arrangement advocated by Shachar segregates the demarcating function of family law, used to define group membership, from the distributive function that ensures the division of intrahousehold resources within the family. Shachar further suggests that demarcating aspects of family laws should fall under the purview of cultural groups while the distribution of property between family members would be governed by the state. According to Shachar, the bifurcated legal authority would give legitimacy to both the state and the group. Thus, juridical autonomy enjoyed by either the state or the cultural group in one sphere of family law is seen as a positive step to ensuring cultural accommodation while providing intragroup equality. Shachar also

suggests that legal pluralist policies in several spheres prevent reification of group boundaries (Shachar 2001). Shachar's proposal directs us toward accommodative arrangements between states and societies that balance group rights with gender equality by adopting legal pluralism in the governance of the family. For the purpose of this study, I define legal pluralism as a policy in which the state recognizes and regulates nonstate laws.[9]

Yilmaz (2005) identifies six types of relationships between state and nonstate laws across a continuum. The set of legal arrangements across an imagined analytical spectrum would have legal centralist arrangements at one end and complete legal pluralism at the other extreme. Between the two extremes exist possibilities such as parallel systems of state and local laws, codification of local laws, partial recognition of local laws, and the incorporation of local actors into the state legal system (Yilmaz 2005, 25–26). Variants of Shachar and Yilmaz's proposals exist in many postcolonial societies: In practice, most postcolonial states accept the policy of cultural pluralism in the governance of the family and tailor different models of legal pluralism[10] to govern the family by sharing authority between states and sections of ethno-religious groups within the society. This book examines the nature of state-society interactions in the governance of the family, and it assesses its impact on the constructions of religious groups and gender relations within the family.

[9] I draw on Griffiths' definition of legal pluralism, which he defines as "that state of affairs, for any social field in which behaviour pursuant to more than one legal order occurs" (Griffiths 1986b, 2). Griffiths defines two types of legal pluralism: The strong variant is the one in which the state law is one among the body of laws, and the second is the one in which the state law identifies and orders nonstate laws (Woodman 1999). Drawing from Griffiths' definition, I adapt the second typology of his definition as it is compatible with a wide range of empirical cases.

[10] Crafting these arrangements requires that states make decisions regarding the recognition of tribunals applying group laws, as well as the possibility of reform in some areas under community authority, especially ones that are against the legal norms of modern states (Allott 1970; Derret 1963; Griffiths 1986b; Hooker 1975).

Research Questions

How do accommodative arrangements advocating cogovernance by state and society in legally plural societies impact the interactions between and within religious groups and other societal bodies? And how do they affect gender equality in the family?

What is the nature of state-society interactions in the adjudication of religious laws in legally plural societies?

Case Selection

Four typologies capture legally plural arrangements made by postcolonial states. Leaning toward extreme legal pluralism is the Lebanese case in which communities have complete autonomy in the governance of the family. In fact, the state does not recognize interreligious marriages (Joseph 2001). The second typology includes states such as South Africa and Botswana that recognize customary laws but not religious laws, and have allowed customary tribunals; states such as Bangladesh and Sri Lanka recognize both customary and religious laws, and allow customary courts. The third typology includes Israel, Malaysia, and Indonesia, which have institutionalized religious courts. The fourth typology leans toward legal centralism, drawn out in the case of Tanzania, which has attempted the codification of law through state-society interactions with local elites but has not accepted customary authority (Allott 1970, Menski 2006). This typology also includes states such as Tunisia, which has codified its laws, and Morocco, which has established a hegemonic Islamic law on different communities through codification. Following decolonization, Morocco abolished Berber customary laws and codified Islamic laws. The state allowed rabbinical courts to govern the Jews, but Christians are governed by Islamic laws except in matters related to repudiation (Moors 2003).

Most postcolonial states have witnessed contestations over the granting of cultural rights in the governance of religious family laws, but India

is an important case to examine because all four possibilities are debated by a broad range of actors within the Indian context. In addition, I have chosen the Indian case because the Indian model of legal pluralism in recognition of religious family laws falls at the center of the spectrum of legally plural arrangements adopted by various states.

India has witnessed contestations between and within religious groups in the regulation of religious family laws. Furthermore, women's roles and rights in the family are terrains over which some of these arguments have been played out. The Indian state has crafted a broad range of accommodative arrangements to govern the family. The Indian state recognizes both religious and customary laws, and the nature of autonomy granted to groups is unevenly circumscribed across groups. The state does not establish religious or customary courts and retains the exclusive authority to enforce the distribution of property. The state has also enacted a secular law to govern interreligious marriages and provided an option to its citizens to opt out of religious laws. In addition, in the Indian case, the conflict over the governance of the family has been sharpest when it comes to the governance of marriage and divorce; in this matter, the Indian state has adopted what I call a model of *shared adjudication*, in which the state splits its adjudicative authority with social actors and organizations in the regulation of marriage and divorce among a section of religious and caste groups and other actors.[11] In doing so, the Indian state adopts what I call a *restrained autonomy* in the governance of the

[11] For instance, Section 29(2) of the Hindu Marriage Act 1955 allows customary divorce, and as such, both state courts and societal bodies act as legal agents in matters of marriage and divorce. This provision was meant to allow caste authorities to regulate customary divorce in castes that have historically practiced divorce, but my data show that many other societal agents also adjudicate in divorce under this provision. Muslim Personal Law in postcolonial India is based on local custom, Islamic laws, and precepts; customary laws are made by sect-based organizations, state-law enactments, and judicial precedent. The state courts administer the uncodified Muslim Personal Law as well as state-enacted laws. In general, state law recognizes uncodified Islamic laws when it comes to marriage and divorce but privileges statutory law in matters of maintenance and postdivorce financial settlement.